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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-1819

NORMAN VAUGHN, FREDDIE BROUSSARD AND LARRY J. BROUSSARD,
Petitioners

V.

VERMILION CORPORATION,
Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES

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ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE THIRD CIRCUIT OF THE STATE OF LOUISIANA

BRIEF AMICUS CURIAE ON BEHALF OF THE LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES

I.

QUESTIONS PRESENTED

Whether artificially constructed canals on private lands at private expense for private purposes and navigation, in part intersecting with navigable waters of the United States, become burdened with a Federal navigational servitude, mandating indiscriminate and uncontrolled public access and use?

II.

AUTHORITY TO FILE AMICUS CURIAE BRIEF

The Louisiana Department of Wildlife & Fisheries as amicus curiae files its brief in accordance with the provisions of

U.S. Sup. Ct. Rule 42(4), 28 U.S.C.A. and with the written consent of all parties.

III.

INTEREST OF THE AMICUS CURIAE

Norman Vaughn, Freddie Broussard and Larry J. Broussard, Petitioners, have asked this Court to review the judgment of Louisiana's Third Circuit Court of Appeals holding that a canal on private property constructed and maintained with private funds for private purposes is a private canal subject to private control and that the public has no right to use the waters thereof without permission even though the canal is in fact navigable and connects with other naturally navigable waterways. In so holding the Third Circuit reasoned that since neither the Rivers and Harbors Act (33 U.S.C., § 401, et seq.), nor the Federal Common Law granted individuals the unrestricted right to use a privately owned natural waterway made navigable with private funds, then the public has no right to use an artificial navigable waterway constructed and maintained with private funds. In support of its conclusion that federal law did not afford a public right of access to the canal, the Third Circuit Appellate Court cited *United States v. Kaiser Aetna*, 408 F.Supp. 42 (D.C. Haw., 1976).

The United States Court of Appeals for the Ninth Circuit in *United States v. Kaiser Aetna*, supra, reversed in part the district court in holding that federal regulatory jurisdiction under the Rivers and Harbors Act does extend to a privately owned natural waterway, which had been made navigable by the owner thereof with private funds, and that the public right of access and use of such waterway is inseparable from federal regulatory jurisdiction under the Rivers and Harbors Act. *United States v. Kaiser Aetna*, 584 F.2d 378 (9th Cir., 1977), writ granted No. 78-738, U.S. Sup. Ct.

The Louisiana Department of Wildlife and Fisheries is an agency of the State of Louisiana legislatively established by La. R.S. 36:602, et seq. (1950) to exclusively manage, protect, conserve and replenish wildlife, fish and aquatic life in the state.

As amicus curiae, it submits this brief in support of Vermilion Corporation, Respondent.

The Department owns and manages approximately 400,000 acres of land on which are located many miles of artificial private canals. These properties are managed as wildlife refuges and management areas for the conservation and replenishment of the state's wildlife, fish and aquatic life. As part of its management program, the Department must close specific canals to public recreational fishing and hunting at night and during various times of the year and on other occasions must obstruct canals for water control and quality.

More specifically, the Department's Rockefeller Wildlife Refuge in Cameron and Vermilion Parishes, Louisiana, is interlaced with approximately 175 miles of canals which have been constructed either by the Department for the installation of water control or water fowl impoundment or by oil companies under lease by the state for access into remote portions of the refuge for mineral extraction. After an oil company completes its drilling venture or the particular well goes dry, the canals are blocked off with earthen plugs or bulkheads to prohibit excessive drainage of the marshes and to prohibit salt water intrusion.

At the Department's Marsh Island Refuge, there are ap-

proximately fifty (50) miles of man made canals and a significant number have been closed with low level weirs to permit water to flow back and forth across the structure. If these structures would not be permitted, thousands of acres of excellent water fowl marshes and marine nursery grounds would be destroyed. These structures, along with the programs adopted by the Department, contribute to the attractiveness of our Louisiana marsh as the major wintering area for water fowl in the Mississippi and Central Flyway.

Regarding the Pointe-au-Chin and Salvador Wildlife Management Areas the Department of Wildlife and Fisheries purchased only the surface rights of the areas with the vendor reserving all mineral interests. The surface ownership and management is extremely critical to the proliferation of fish, and other forms of aquatic wildlife. All mineral access canals are coordinated through the Department with the developing oil companies in order to provide maximum protection of the environment while still permitting an orderly development of the mineral deposits. The loss of control over the use of these canals would be extremely detrimental to both fish and game management programs.

The Department's Pass-a-Loutre Water Fowl Management Area is located at the mouth of the Mississippi River on the existing delta. There the annual high water tends to fill the canals and cause adverse water quality conditions, contributed in part by the very existence of the canals. Complete dominion of these canals is necessary to reverse the ecological unfavorable water conditions.

Should this Court reverse the Third Circuit Court of Appeals and hold that private waterways, constructed and maintained on private property with private funds for private purposes are subject to unlimited public access and use, the

effect on wildlife, fish, and aquatic life management programs would be near fatal, resulting in disasterous effects on the renewable resources which the Louisiana Department of Wildlife & Fisheries is legally responsible to protect, conserve, and replenish. Accordingly, the Court's decision in this case is of great interest to the Department.

IV.

ARGUMENT

A.

THE LEGAL POSITION AND AUTHORITIES CITED BY VERMILION CORPORATION, RESPONDENT, GOVERN THE ISSUES PRESENTED IN THIS CASE.

The Louisiana Department of Wildlife & Fisheries as amicus curiae adopts completely both the legal arguments advanced by Vermilion Corporation, Respondent, and the legal authorities cited in their support.

B.

COMPELLING POLICY INTERESTS IN THE MANAGEMENT OF MARSH LAND HABITAT FOR WILDLIFE AND FISH RESOURCES MILITATE AGAINST THE EXTENSION OF THE FEDERAL NAVIGATIONAL SERVITUDE TO RESPONDENT'S PRIVATELY CONSTRUCTED CANAL SYSTEM ON ITS PRIVATE LANDS.

As pointed out in its statement of interest, the Louisiana Department of Wildlife & Fisheries owns and manages approximately 400,000 acres of land which are interlaced with private canals similar to Respondent's canal system, and

which will be adversely effected if burdened with a Federal navigational servitude.

The lands of Vermilion Corporation and of the Department are characteristically the same, both being coastal marshes whose ecology is very frail and easily disturbed by water quality and mineral exploration.

The areas are unique natural habitat for all forms of fish and wildlife.

The conservation and promotion of the abundant wildlife and aquatic resources located in this habitat require vigilant biological management programs, encompassing continuous on-site surveillance and research at considerable economic expense to the State of Louisiana and to the private owner.

The programs followed by the Department necessitate that public access to and use of the marshes of the refuges and management areas be restricted and completely controlled. As a consequence, at night and at various periods of the year, there is not permitted any access or use whatsoever for hunting or fishing whether it be for sport or for commercial gain. The unlimited public use sought by the Petitioners will completely disrupt the Department's management programs and in time, will destroy the habitat supporting migratory water fowl, fur bearing animals, alligators, fish and other forms of aquatic life, as well as the renewable resources themselves.

By its present policy and authority over access and use of the private canals on the various refuges and management areas the Department provides extensive law enforcement protection. But because of the enormous extent of the areas in question, unfetted public access and use will render law

enforcement impossible, the end result of which will be no practical protection to the animals and fish, the habitat, the trapper, the hunter, or the fisherman.

The management practices followed by Department Biologists make water level and salinity manipulation on the canal systems essential to improve conditions of the marsh and in turn, animal population. This critical function of water control is accomplished by the installation of man made obstructions in the canal systems. Depending on the goals desired, the Department has installed weirs in those canals affected by tides. Bulkheads have been and are used to prevent over drainage and salt water intrusion. Water impoundments, with water levels being controlled by gravity flow, tidal flow or pumps, are used to provide ideal habitat for fur animals, alligators, crayfish, and migratory water fowl. If the canals and water courses traversing the refuges and management areas become burdened with the public use servitude, the wildlife biologists cannot continue their water level control projects, which will cause the destruction of migratory water fowl marshes, the decline of animal populations, and the disappearance of marine nursery grounds.

With the increased demands for energy, oil and gas exploration in the marshes owned by the Department has intensified. Concomitantly, with this intensification, the additional use of coastal marshes for inland waterways, has resulted, causing increased water control problems to the biologists. The added waterway use has necessitated the construction and maintenance of additional levees to return the marshlands to the desired ecological balance. The navigational servitude claimed by Petitioners would prevent the Department from undertaking the necessary levee construction, and, consequently, unique wildlife habitat would decline along with natural food supplies so essential to support an abun-

dant wildlife and fish resource. Without habitat and adequate food supply, wildlife, fish, and other forms of aquatic life just disappear.

In more recent times, that is for more than fifteen (15) years, the Department has been waging a continuing battle with erosion of the levees and canal banks in its marshland canal systems. The full extent of the erosion problem and its cause, namely, wave action derived by boat traffic have been of great concern to Game and Fur Biologists because of the harmful effects to the environment of fur bearing animals and alligator populations.[1] To alleviate and reduce the environmental problems caused by erosion, the Department must continuously refurbish the levees lining its canal systems and construct new ones. The erosion problem and its harmful effects will be magnified and multiplied by the increased boat traffic which will follow the uncontrolled public access and use permitted by the Federal navigational servitude claimed by Petitioners. The Department in more recent times has not been able to prevent erosion, but merely slow its pace. With unlimited access and use by boat traffic, the battle to check erosion will be lost and there will follow a depletion of habitat with the accompanying reduction of wildlife and fish populations.

The practical needs and considerations of productive wildlife and aquatic management are grave policy concerns to the Louisiana Department of Wildlife & Fisheries as the custodian of Louisiana's plentiful renewable natural resources. The management activities described are the accumulation of marsh bottom experience gathered by many fish, game

1. "Erosion of Canal Banks on the Rockefeller Wildlife Refuge". Study of Louisiana Wildlife & Fisheries Commission (1961).

and fur biologists over many years.[2] Likewise, the adverse effects on habitat, food supply and wildlife and fish populations when these practices are permitted or followed for whatever reason is supported by this marsh bottom experience. [3] The unlimited public access and use which the Federal navigational servitude would impose will prevent the implementation of good management practices, which are presently followed on the private canal systems. The grave adverse effects on the wildlife, fish and aquatic life will certainly follow as night follows day.

It is readily apparent that good marshland management practice for the protection, conservation and replenishment of animal, fish, and other forms of aquatic life, which occupy these excellent habitat, run clearly into the teeth of the Federal navigational servitude sought by Petitioners, for the very tools employed in the management programs, i.e., restricted access and use of canals and habitat, employment of weirs, bulkheads, earthen plugs, and water impoundments, are the very obstacles the Federal navigational servitude in favor of the public cannot tolerate, i.e., restricted access and use by water course obstructions.

The Department suggests that under the facts of this case in view of the policy interest of the Department and the pri-

2. Wildlife Educational Bulletin No. 106, "The Fur Animals, the Alligator, and the Fur Industry in Louisiana.", Louisiana Wildlife & Fisheries Commission.

Hugh M. Burts & Chester W. Carpenter, "A Guide to Hunting in Louisiana--The Hunter's Paradise." Louisiana Wildlife Educational Pamphlet.

3. Ibid.

vate property owner militate against extending the Federal navigational servitude to Respondent's privately constructed course system upon its private lands.

CONCLUSION

There are no cogent needs or federal interest present warranting the promotion or protection of navigation on the waters of Respondent, the character of which are local in nature and entirely private. Accordingly, for the weighty reasons particularized in the brief of Vermilion Corporation, Respondent, and in some part for the additional reasons that law must be responsive to practical needs and considerations, which are in the nature of policy, this Court should affirm the Louisiana Courts for their judgment is correct as a matter of law.

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